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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1229~~ 799 478

THE PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

ANNA W. FERGUSON, ADMINISTRATRIX OF THE ESTATE OF MATHEW W. FERGUSON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED NOVEMBER 25, 1884.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and eighty-four, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex-officio* judge of said circuit court.

ANNA W. FERGUSON, Administratrix of the Estate of Matthew W. Ferguson, Deceased, *v.* THE PENNSYLVANIA COMPANY. } 7677. Civil Action.

Be it remembered that heretofore, to wit, at the May term of said court, on the 30th day of August, A. D. 1883, before the Honorable William A. Woods, judge as aforesaid of said court, the plaintiff, by Messrs. McDonald, Butler & Mason, her attorneys, filed her complaint in the above-entitled cause in the words following, to wit:

The plaintiff, a citizen and resident of the State of Illinois, complains of the defendants, The Pennsylvania Company and
2 The Pennsylvania Railroad Company, corporations organized and existing under and by virtue of the laws of the State of Pennsylvania, and the Jeffersonville, Madison & Indianapolis Railroad Company, a corporation organized under and by virtue of the laws of the State of Indiana, and says that on the 2d day of August, 1883, this plaintiff was duly appointed administratrix of the estate of Mathew W. Ferguson, deceased, by the probate court of Cook county, State of Illinois, and in such capacity brings this action; that on June 6th, 1883, the defendants maintained and were engaged in the operation of a certain railway within the State of Indiana, running from the city of Indianapolis to the city of Jeffersonville, in said State, and were engaged in the business of transporting passengers and freight upon said railway for the public for hire; that on said day defendants were employed in transmitting a certain new sleeping coach named Welaka, said coach being consigned by the Pullman Palace Car Company to James Martin, assistant superintendent of the Pullman Sleeping Car Company, Louisville, Kentucky, and defendants were at the same time
3 employed and engaged in transporting plaintiff's said decedent, Matthew W. Ferguson, who was, at the time, a messenger of the above consignor in charge of and occupying said coach "Welaka;" plaintiff says that while so engaged in the transportation of said coach "Welaka," and of plaintiff's said decedent as messenger in charge of said coach, the defendants negligently, recklessly, and without care operated and ran their train to which said coach "Welaka" was attached, and on which the said decedent was being transported, upon a negligently constructed track, and upon a roadbed which was out of repair and in a highly dangerous condition, without regarding danger signals which were made to the engineer, and without keeping a lookout upon the track ahead, so that the said train, while running at the rate of forty or fifty miles per hour,

was plunged into an abyss, said coach "Welaka" being completely wrecked, and plaintiff's said decedent, without any negligence or fault on his own part, being instantly killed thereby.

Plaintiff says that decedent was a young man of good edu-
4 cation, character, and business habits; that he left him surviving a widowed mother and three sisters, his next of kin, who were largely dependent for their support upon decedent, and are, by reason of defendants' said negligence and wrongful acts, left without due means of subsistence. Wherefore plaintiff prays that she may have judgment against defendants for damages in the sum of $10,000.00, in which amount she is injured.

McDONALD, BUTLER & MASON,
Att'ys for Pl'ff.

And afterwards, to wit, at the May term of said court, on the 4th day of October, 1883, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their attorneys, and the defendant files its motion for an order requiring the plaintiff to make its complaint herein more specific, which motion is in the words and figures following, to wit:

The defendant, & The Pennsylvania Company, moves the court to require plaintiff to make the averments of her complaint more specific in the respects following severally:

1st. By showing how and in what manner the track of said
5 road was negligently constructed.

2d. By showing how and in what manner such negligent construction of the track caused or contributed to the alleged accident.

3d. By showing how and in what respects the road-bed was out of repair and in a highly dangerous condition.

4th. By showing how and in what manner such condition of the track caused or contributed to the alleged accident.

5th. By showing by whom, when, and how the alleged danger signals were made.

6th. By showing why the failure to regard the alleged danger signals caused or contributed to an accident.

7th. By showing why the failure to keep a lookout ahead caused or contributed to the accident.

STANSIFER, BAKER, HORD & HENDRICKS,
For Def't, Pennsylvania Co.

And the court, being sufficiently advised in the premises, doth now overrule the same; and to the overruling thereof the defendant now excepts.

And afterwards, to wit, at the May term of said court, on the 22d day of October, 1883, before the Honorable William A. Woods,
6 judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, The Pennsylvania Company, by Baker, Hord & Hendricks and S. Stansifer, its attorneys, and files its answer herein in the words following, to wit:

Now comes the defendant, The Pennsylvania Company, and for answer to the complaint says that it denies each allegation thereof.

Wherefore it prays judgment.

S. STANSIFER,
BAKER, HORD & HENDRICKS,
For Def't.

And afterwards, to wit, at the May term of said court, on the 30th day of October, 1883, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. McDonald, Butler & Mason, her attorneys, and, upon their motion, it is ordered that the above-entitled cause be, and the same is hereby, dismissed as to the defendants, The Pennsylvania Railroad Company and The Jeffersonville, Madison and Indianapolis Railroad Company.

And afterwards, to wit, at the November term of said court, on the 19th day of January, 1884, before the Honorable William
7 A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Messrs. Baker, Hord & Hendricks, its attorneys, and files its motion to suppress part of the plaintiff's depositions herein, and said motion is in the words following, to wit:

(This motion is not on file.)

And afterwards, to wit, at the November term of said court, on the 22d day of January, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Messrs. McDonald, Butler & Mason, her attorneys, and at the same time comes the defendant, by Messrs. Baker, Hord & Hendricks, its attorneys, and this cause now coming on for trial, here comes a jury, to wit, Jesse N. Townsend, W. S. Meade, Eli Parker, Jno. B. Goodwin, Sanford S. Ripley, Jonathan Dillon, Zachariah Senour, William B. Carter, James Keigwin, William P. Pettinger, William G. Jencks, and John P. Cathcart, who, being duly empanneled and sworn, and having partially heard the evidence herein, are by the court allowed to separate until the calling of this cause on to-morrow morning.

8 And afterwards, to wit, at the November term of said court, on the 23d day of January, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause was had, to wit:

Come now the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and, having

further heard the evidence herein, are by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 24th day of January, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and, having heard the residue of the evidence, are by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the November term of said court, on the 25th day of January, 1884, before the Honorable William
9 A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and having heard the argument of counsel and charge of the court herein, now retire to their room to consider of their verdict herein.

And afterwards, to wit, at the November term of said court, on the 26th day of January, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come again the parties, by their respective attorneys, and the jury heretofore empanneled and sworn herein come also, and return into court the verdict following: We, the jury, find for the plaintiff, and assess the damages at seven thousand dollars ($7,000.00).

JAMES KEIGWIN, *Foreman.*

And thereupon the defendant, by its attorneys, moves the court for a new trial herein.

And afterwards, to wit, at the November term of said court,
10 on the 6th day of February, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and files its motion for a new trial herein, in the words following, to wit:

The defendant moves the court to set aside the verdict of the jury and grant said defendant a new trial in this cause upon the following grounds and for the following reasons, to wit:

1. The verdict of the jury is contrary to the law of the case.

2. Said verdict is not in accordance with or sustained by the evidence in the cause.

3. The court erred in its instruction to the jury as to the measure of damages, in this that the court should have instructed the jury that the measure of damages was the pecuniary injury sustained by the next of kin by the death of Matthew W. Ferguson.

4. The court erred in its instruction to the jury as to the measure of damages.

5. The damages assessed by the verdict of the jury are excessive.
6. The court erred in instructing the jury as follows:

11 "In respect to the damages to be awarded in case of a verdict for the plaintiff, there is no definite legal rule, except that the amount cannot exceed ten thousand dollars. The action is one given by the statute for the benefit of the next of kin. Neither the right nor measure of recovery depends upon proof of the value of the life to the next of kin; but it is proper for the jury to consider the character, age, and capacity, and other circumstances of the deceased, his relation those for whose benefit the action is prosecuted and its sound discretion determine the amount of the recovery, not exceeding the amount stated."

BAKER, HORD & HENDRICKS,
For Defendant.

And afterwards, to wit, at the May term of said court, on the 25th day of July, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, the plaintiff by Messrs. McDonald, Butler & Mason, her attorneys, and the defendant by S. Stansifer and Baker, Hord & Hendricks, its attorneys; and thereupon the
12 court being sufficiently advised in the premises, doth now overrule the motion for a new trial herein; and the plaintiff, by her attorneys, thereupon moves the court for judgment upon the verdict of the jury heretofore rendered herein; which motion is granted.

It is therefore considered by the court that the plaintiff do recover of said defendant, The Pennsylvania Company, said sum of seven thousand *thousand* dollars ($7,000.00), together with their costs and charges herein expended, taxed at $—.

And the defendant now files its bill of exceptions herein, in the words following, to wit:

Be it remembered that the above-entitled cause came on to be tried in the circuit court of the United States for the district of Indiana, and at the November term, 1883, thereof, on the 22d day of January, 1884.

Be it further remembered that it appeared upon the trial of said cause that the injury and death of said Mathew W. Ferguson occurred on the 6th day of June, 1883, at Farmington, in the county of Jackson, and State of Indiana.

Be it further remembered that upon the trial of said cause
13 said Anna W. Ferguson and J. J. Higgins were offered as witnesses on behalf of the plaintiff, and testified as follows, to wit:

ANNA W. FERGUSON, plaintiff and mother of Mathew W. Ferguson, the deceased, testified:

Mathew W. Ferguson the deceased was in his 25th year at the time of his death and was unmarried. His home at the time of

his death was in Pullman, Ill., and he was in the employment of Pullman's Palace Car Company. I resided at Duquoin, Ill., but I do not know what distance that is from Pullman. Pullman is a short distance from Chicago, Ill., and Duquoin is south of the Ohio and Mississippi railroad. I am a widow, and was so at the time of Mathew W. Ferguson's death. Besides Mathew W. Ferguson, my son, I have three daughters. I had been receiving aid from my son. He was a robust young man able to work, and he did work. He was perfectly moral and sober—he had not a bad habit in his life. His education was good. He had a good common school education and had spent two years at Woodward College; he was a student, and he studied afterwards and he had taught school, and he was studying law at the time, and had been studying law
14 and he was very ambitious to become somebody in the world; he was a very intellectual man and an intelligent, and a superior man for his age.

I have three daughters living: The eldest one is 22 years of age; I don't remember whether the next is 20 or 19; the next one is 17. It was 5 years the 18th day of last October since I came to Duquoin; previous to that I had lived in Hamilton county, Ohio, about 30 miles from Cincinnati, and I went from Hamilton county to Duquoin, Ill.

My son, Mathew W. Ferguson, left home to go home into the employment of the Pullman Company the 4th or 5th day of May, 1882, and went directly into the employment of the Pullman Company. His place of residence from that time until the time of his injury and death on the 6th day of June, 1883, was at Pullman, and did not see him at all from the time he left home in May, 1882, until after his death. Before leaving Duquoin and going to Pullmann he had not been doing anything at Duquoin that I remember of. He taught school, but did not teaeh at Duquine; he taught school at Pamero the spring and winter before he went
15 to Pullman. I do not know the exact number of miles that Pamero is from Duquoin, but I think the station is on the Central road ten miles north of Duquoin. Before he taught school he was only a boy; he had been going to school. In the first place he had to quit going to school when his father died and he had to help us, and he taught school from that time on until he went to Pullman, I think every winter, probably, and he studied law in the summer.

As to the length of time he had been teaching school before he went to Pullman—he taught school the winter we went to Du Quoin. He taught school in Ohio the winter before we went to Du Quoin. As to the number of winters he had been teaching school, I think he taught every winter, if I remember right, until last winter, and this since his father died, and his father has been dead seven years. In the summer time he was not doing very much of anything, and he would do whatever he could get to do, and he was studying law after he went to Du Quoin.

J. J. HIGGINS testified for the plaintiff:

16 I reside in Du Quoin, Ill., and have resided there since June, 1866. I was acquainted with Mathew W. Ferguson, deceased, since the family moved to Du Quoin from Ohio in 1878. I think he was slightly over six feet in height, and he was a very fine man, physically, and his habits were excellent. He smoked, and that was the only habit that we call at all vicious that the young man was addicted to. He was held to be a young man of superior intellect, that was making the most of the advantages he had. He had a very fine library of books, which were left by his father—legal books and general literature; and he was a very close student, and a constant one. He had been studying law, and I think the summer before he left Du Quoin he spent in the law office of Judge Murphy, of our county seat. The two winters preceding his leaving home for this employment he had been teaching school. I know his mother and sisters, and he left surviving him his mother and three sisters. My wife is a sister of his mother. I am a watchmaker by trade, and am conducting a jewelry business in Du Quoin, and

17 have resided there since 1866. I represented our district in the General Assembly of the State at its last session.

Be it further remembered that evidence was also introduced on the trial of the above cause tending to show that the deceased, Mathew W. Ferguson, was at the time of his death, and for more than a year prior thereto, had been in the employ of the Pullman Palace Car Company, at Pullman, Illinois, occupying the position of first messenger, it being among his duties as such messenger to accompany Pullman cars consigned to parties over the country to their destination, and deliver the same to the proper persons.

Evidence was also introduced on the trial tending to show that the deceased, Mathew W. Ferguson, did not contribute to the occurrence of the accident which caused his death, and that he was free from fault.

Be it further remembered that this was all the evidence introduced on the trial of said cause tending to show the damages which the jury might properly find by their verdict in favor of the plaintiff as administratrix of said Mathew W. Ferguson.

18 Be it further remembered that upon the trial of said cause there was no evidence introduced to the jury tending to show the expectancy of life of the said Mathew W. Ferguson, or tending to show the amount of his pecuniary income, or tending to show the amount of his necessary expenses in support of himself, or tending to show what he had contributed to the support of his next of his kin, unless the evidence hereinbefore set forth so tends.

Be it further remembered that upon the trial of said cause counsel for the plaintiff, in argument to the court and jury, claimed that the measure of damages was the value of the life of said Mathew W. Ferguson, and not the pecuniary loss immediate and prospective occasioned by his death to his next of kin, and counsel for the defendant claimed, in argument to the court and jury, that the measure of damages was not the value of the life of said Mathew W. Ferguson, but the pecuniary loss immediate and prospective oc-

casioned by his death to his next of kin; that if more than nominal damages are allowed it must be for the value of the life to the next of kin, and of that value there is no evidence. This state-
19 ment of the argument of counsel is made over the objection of counsel for plaintiff, on the ground that the same is not pertinent to any question involved in the exceptions taken to the ruling of the court.

Be it further remembered that after the jury had heard the evidence and the arguments of counsel, the court, upon its own motion, instructed the jury as follows, to wit:

GENTLEMEN OF THE JURY: Notwithstanding the magnitude and importance of this suit, I find it necessary to say comparatively little in reference to the law of it. I need hardly repeat what I say in every case, that questions of fact, and the credibility of witnesses, and the inferences to be drawn from the testimony are left solely to the jury. In reference to the law, you are bound by the instructions of the court.

The action is by Mrs. Ferguson, as administratrix of the estate of Mathew W. Ferguson, deceased, to recover of the defendant, The Pennsylvania Company, damages for the death of Mathew W. Ferguson. The defendant is a common carrier of passengers by railroad; the deceased, Mathew W. Ferguson, it is not disputed,
20 was, on the 6th day of June, 1883, a passenger upon the defendant's road, and while being carried by the defendant was killed.

The immediate or proximate cause of his death was the running of the train upon which he was riding into a cut or chasm in the road-bed. It being shown that the death was caused in this way, the defendant is liable in damages therefor, recoverable by the plaintiff in this action, unless it has been shown to your satisfaction (and the burden of this showing is upon the defendant) that in respect to the death, that is to say, in respect to the proximate cause or causes of the death, the company was free from fault or negligence. The law requires of the carrier of passengers the highest practicable diligence, skill, and foresight which can reasonably be employed to accomplish the carriage without injury to the passenger; and any failure to employ or put forth the requisite care or skill or foresight is negligence which makes the carrier liable if it causes an injury.

In respect to railroad companies, or carriers by railroad,
21 they are bound by this requirement of the highest practicable diligence in respect to everything which may reasonably be supposed to involve or affect the passenger's safety, embracing the construction and maintenance of the road-bed and track, including, of course, culverts and bridges, the construction of engines, cars, and machinery, brakes, and other known useful appliances for the purpose of running and stopping trains, and the employment of competent and careful men in every department affecting the question of safe carriage, and the doing of his full duty by every man so employed.

If the death in question was the result of inevitable accident, the

defendant is not responsible for it. An inevitable accident is one which experience had not foretold, which human sagacity could not reasonably have foreseen, and which the exercise of the highest skill and diligence could not have provided against.

If the injury was caused by the negligence of the defendant, that is, by a failure of the company to use proper care or skill in any respect which approximately caused the injury, the company is liable.

In respect to the chasm into which the train in question
22 was plunged, the defendant claims that it was a washout, caused by an extraordinary flood, the like of which had never before occurred, and that the road-bed at that place had been constructed and maintained in a condition sufficiently safe against any freshet or flood which the company was bound to anticipate. If this was so (and it is a question of fact for the jury whether or not it was), the company is not to be held accountable for the washout, nor for the death of the deceased, unless for some negligence other than in the construction of the road-bed and track. If there were defects in the culvert or in its construction, and yet if you are satisfied that on account of the extraordinary flood the washout would have occurred even if these defects had not existed, the company should not be held liable on account of such defects. If there was no defect in the construction of the culvert and track at this point affecting the safe running of trains, the company may still be liable, and is liable in this action, if the train was run negligently into the chasm. Whether there was negligence in this respect involves the inquiry whether under the circumstances the company
23 ought to have known or ought to have apprehended the danger before the train was permitted to approach the point where the disaster occurred. If there was no negligence in this respect, was there any negligence on the part of those who had immediate charge of the train in respect to the speed at which the train was run, or in respect to the lookout kept for danger, or in respect to the efforts made to stop the train?

It can hardly be necessary to say that for any negligence which did not cause, or contribute to cause, the injury complained of, the defendant is not liable.

The counsel upon either side have presented and urged upon your attention the facts in the evidence, and inferences to be drawn therefrom, and with the aid of these arguments you will be able, without any discussion or review of the evidence by the court, to apply the law to the facts and to arrive at a proper conclusion.

In respect to the damages to be awarded in case of a verdict for the plaintiff, there is no definite legal rule, except that the amount cannot exceed ten thousand dollars. The action is one given by the statute for the benefit of the next of kin. Neither the right
24 nor measure of recovery depends upon proof of the value of the life to the next of kin; but it is proper for the jury to consider the character, age, and capacity, and other circumstances of the deceased, his relations to those for whose benefit the action is

prosecuted, and in its sound discretion determine the amount of the recovery not exceeding the amount stated.

I will add that, in the absence of wife and children, the mother and sisters are the next of kin within the sense of this statute.

Nothing should be allowed, however, on account of the pain or anguish of the deceased suffered in the article of death, nor for the grief of the mother and sisters on account of the death or the circumstances of its occurrence.

You will retire in charge of your bailiff, and when you have agreed upon a verdict seal it up and let your foreman take charge of it, and produce it in open court to-morrow morning. During your separation do not indicate the result of your deliberations.

And this was all the instruction given the jury in charge of the court.

Be it further remembered that at the time of the giving of the foregoing instructions by the court to the jury the defendant
25 objected and excepted to the following portion thereof relating to the measure of damages, to wit:

"In respect to the damages to be awarded, in case of a verdict for the plaintiff, there is no definite legal rule except that the amount cannot exceed ten thousand dollars. The action is one given by the statute for the benefit of the next of kin. Neither the right nor measure of recovery depends upon proof of the value of the life to the next of kin; but it is proper for the jury to consider the character, age, and capacity and other circumstances of the deceased, his relation to those for whose benefit the action is prosecuted, and in its sound discretion determine the amount of the recovery, not exceeding the amount stated."

Be it further remembered that the jury aforesaid having returned the verdict for the plaintiff set out in the record, the defendant immediately upon the return of said verdict moved the court to set aside the verdict so rendered and grant the defendant a new trial in said cause, and afterwards, on the 6th day of February, 1884, at the same term of said court, filed its motion in writing to set aside said verdict and grant it a new trial, which motion in writing was
26 and is in the following words, to wit:

The defendant moves the court to set aside the verdict of the jury and grant said defendant a new trial in this cause upon the following grounds and for the following reasons, to wit:

1. The verdict of the jury is contrary to the law of the case.

2. Said verdict is not in accordance with or sustained by the evidence in the cause.

3. The court erred in its instruction to the jury as to the measure of damages, in this, that the court should have instructed the jury that the measure of damages was the pecuniary injury sustained by the next of kin by the death of Mathew W. Ferguson.

4. The court erred in its instructions to the jury as to the measure of damages.

5. The damages assessed by the verdict of the jury are excessive.

6. The court erred in instructing the jury as follows:

"In respect to the damages to be awarded in case of a verdict for

the plaintiff there is no definite legal rule, except that the amount cannot exceed ten thousand dollars. The action is one given by the statute for the benefit of the next of kin. Neither the right
27 nor measure of recovery depend upon proof of value of the life to the next of kin; but it is proper for the jury to consider the character, age, and capacity, and other circumstances of the deceased, his relation for those for whose benefit the action is prosecuted, and in its sound discretion determine the amount of the recovery, not exceeding the amount stated."

And be it further remembered that afterwards, to wit, on the 25th day of July, 1884, at said term of said court aforesaid, the court overruled the defendant's said motion for a new trial, to which ruling the defendant then and there excepted, and rendered the judgment in favor of the plaintiff on said verdict set out in the record, to the rendition of which judgment the defendant then and there excepted.

And the court having given said defendant thirty days from and after the rendition of said judgment within which to prepare and file its bill of exceptions, the said defendant now, and within the thirty days so granted by the court, tenders this its bill of exceptions, and prays that the same may be signed, sealed, and made part of the record, which is now done, this 25th day of July, A. D. 1884.

WILLIAM A. WOODS. [SEAL.]

28 And afterwards, to wit, at the May term of said court. on the 5th day of August, 1884, before the Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and files its appeal bond herein in the sum of ten thousand dollars, with Joseph I. Irwin as surety thereon, and said bond is approved by the court.

29 UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea, which is in the said circuit court before you, between Anna W. Ferguson, administratrix of the estate of Mathew W. Ferguson, deceased, plaintiff, and The Pennsylvania Company, defendant, a manifest error hath happened to the great damage of the said The Pennsylvania Company, defendant, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 13th day of October next, in the said Supreme Court to be then and there

held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 5th day of August, A. D. 1884.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

30 United States of America to Anna W. Ferguson, administratrix of the estate of Mathew W. Ferguson, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Pennsylvania Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the said circuit court, this 5th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] W. A. WOODS.

30½ We hereby acknowledge due service of within citation, this 26th day of August, 1884, a copy of said citation and all other prescribed formalities being waived.

JOSEPH E. McDONALD,
JOHN M. BUTLER,
Att'ys for Def't in Error.

31 UNITED STATES OF AMERICA, } *ss:*
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the record in the cause of Anna W. Ferguson, adm'x, &c., *vs.* The Pennsylvania Company, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said circuit court, this 26th day of August, A. D. 1884.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

Rec'd of The Pennsylvania Company nine dollars & thirty-five cents ($9.35), costs of this transcript.

NOBLE C. BUTLER, *Clk.*

32 In the Supreme Court of the United States.

THE PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
ANNA W. FERGUSON, Administratrix of the Estate of Matthew W. Ferguson, Defendant in Error.

In error to the circuit court of the United States for the district of Indiana, seventh circuit.

Now comes into the Supreme Court of the United States the said plaintiff in error, the said Pennsylvania Company, by Simeon Stansifer, Thomas A. Hendricks, and Conrad Baker, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid was given for the said Anna W. Ferguson, administratrix of the estate of Matthew W. Ferguson, deceased, against the said Pennsylvania Company, whereas by the law of the
33 land the said judgment ought to have been given for the said Pennsylvania Company against the said Anna W. Ferguson, administratrix of the estate of Matthew W. Ferguson, deceased, and there was, and is also, error in the proceedings and judgment aforesaid in the following particulars, to wit:

First. In the giving by the court to the jury (of the court's own motion) the following instruction, to wit:

"In respect to the damages to be awarded in case of a verdict for the plaintiff there is no definite legal rule, except that the amount cannot exceed ten thousand dollars. The action is one given by the statute for the benefit of the next of kin. Neither the right nor measure of recovery depends upon proof of the value of the life to the next of kin; but is proper for the jury to consider the character, age, and capacity, and other circumstances of the deceased,
34 his relation to those for whose benefit the action is prosecuted; and in its sound discretion determine the amount of the recovery not exceeding the amount stated."

Therefore, the said Pennsylvania Company prays that the judgment aforesaid, and that the other error in said record and proceedings may be reversed, and now and altogether held for nothing, and that it be restored to all things which it hath lost by occasion of said judgment.

S. STANSIFER,
THOMAS A. HENDRICKS,
CONRAD BAKER,
Attorneys for Plaintiff in Error.

Endorsed on cover: Indiana C. C. U. S. No. 1229. The Pennsylvania Company, plaintiff in error, *vs.* Anna W. Ferguson, administratrix of the estate of Mathew W. Ferguson, deceased. Filed November 25, 1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

THE PENNSYLVANIA COMPANY

vs.

ANNA W. FERGUSON,
ADMINISTRATRIX OF THE ESTATE OF MATHEW W. FERGUSON, DECEASED.

No. 1,229

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR THE PLAINTIFF IN ERROR.

JOS. RATTI, PRINTER, 76 S. ILLINOIS ST., INDIANAPOLIS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

THE PENNSYLVANIA COMPANY
vs.
ANNA W. FERGUSON,
ADMINISTRATRIX OF THE ESTATE OF MATHEW W. FERGUSON, DECEASED.

No. 1,229

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

STATEMENT.

The action in the court below was brought on the 30th day of August, 1883, by Anna W. Ferguson, administratrix of the estate of Matthew W. Ferguson, deceased, plaintiff in error, against the Pennsylvania Company, defendant in error, the Pennsylvania Railroad Company, and the Jeffersonville, Madison and Indianapolis Railroad Company. The complaint alleged that the plaintiff was a citizen of the State of Illinois; that the Pennsylvania Company and the Pennsylvania Railroad Company were Pennsylvania corporations, and

that the Jeffersonville, Madison & Indianapolis Railroad Company was an Indiana corporation. That she had been duly appointed administratrix of the estate of Matthew W. Ferguson, deceased, and that on the 6th day of June, 1883, the defendants were engaged in operating a railway within the State of Indiana, from the city of Indianapolis to the city of Jeffersonville, and were carriers of passengers and freight upon said railway. That upon said day the defendants were employed in transporting a new sleeping coach, consigned by Pullman's Sleeping Car Company, to the city of Louisville, and were at the same time engaged in transporting the plaintiff's decedent, Mathew W. Ferguson, who was at the time a messenger of the consignor in charge of and occupying said sleeping coach. That while so engaged in the transportation of said sleeping coach and said plaintiff's decedent, the defendants negligently, recklessly and without care operated and ran their train, to which said sleeping coach was attached, and upon which said decedent was being transported, upon a negligently constructed track, and upon a road bed which was out of repair and in a highly dangerous condition, without regarding danger signals which were made to the engineer, and without keeping a lookout upon the track ahead, so that the train while running at the rate of forty or fifty miles per hour, was plunged into an abyss, said sleeping coach being completely wrecked, and the plaintiff's decedent, without any negligence or fault on his part, was instantly killed thereby.

The complaint also averred that the decedent was a young man of good education, character and business habits; that he left surviving him a widowed mother and three sisters, his next of kin, who were largely dependent for their support upon decedent, and were by

reason of defendant's said negligent and wrongful acts, left without due means of sustenance. And the plaintiff prayed judgment for $10,000 damages.

(Printed transcript, pages 1 and 2).

On the 22d day of October, 1883, the defendant, the Pennsylvania Company, the plaintiff in error, filed its answer denying each allegation of the complaint.

(Printed transcript, pages 2 and 3).

On the 30th day of October, 1883, the plaintiff dismissed her suit as to the Pennsylvania Railroad Company, and the Jeffersonville, Madison & Indianapolis Railroad Company.

(Printed transcript, page 3).

On the 22d day of January, 1884, the cause was tried by a jury, which returned a verdict for the plaintiff, the defendant in error, for $7,000.

(Printed transcript, pages 3 and 4).

On the 6th day of February, 1884, the defendant, the plaintiff in error, filed its motion for a new trial, assigning among other reasons in support of its motion, that the damages assessed by the jury were excessive, and that the court erred in instructing the jury as to the measure of damages.

The court overruled the motion of the defendant, the plaintiff in error, for a new trial, and rendered final judgment on the verdict.

(Page 5 of printed transcript).

The bill of exceptions (commencing on page 5 of the printed transcript) shows that the injury and death of Matthew W. Ferguson occurred on the 6th day of June, 1883; that Matthew W. Ferguson was in the 25th year

of his age at the time of his death, and unmarried. His home at the time of his death was in Pullman, Illinois, and he was in the employment of Pullman's Palace Car Company. He left home to go into the employment of the Pullman Company on the 4th or 5th day of May, 1882, and went directly into the employment of the Pullman Company. His place of residence from that time until the time of his injury and death was at Pullman, and his mother, Anna W. Ferguson, did not see him at all from the time he left home in May, 1882, until after his death. Matthew W. Ferguson left surviving him his mother, Anna W. Ferguson, and three sisters, his next of kin. At the time of the trial the eldest sister was 22 years of age, the next 19 or 20 years of age, and the next one 17 years of age. The mother of Matthew W. Ferguson and her family removed from Hamilton county, Ohio, to DuQuoin, Illinois, on the 18th day of October, 1878, and continued to reside at that place, except Matthew W. Ferguson, until the trial of the cause. Pullman is a short distance from Chicago, Illinois, and DuQuoin is south of the Ohio and Mississippi Railroad. Matthew W. Ferguson was a robust young man, industrious, of good habits, and with a good common school education. He had taught school during the winter before the family moved to DuQuoin, and taught school every winter prior to his going to Pullman. In the summer he did not do very much of anything, but was studying law after he went to DuQuoin.

His mother had received some aid from him, but the evidence did not disclose when or in what amount, or in what manner. He did not teach school at DuQuoin, but at Pamero, a place about ten miles from DuQuoin, and before leaving DuQuoin and going to Pullman, he had not been doing anything at DuQuoin.

Matthew W. Ferguson at the time of his death, and for more than a year prior thereto, had been in the employ of Pullman's Palace Car Company, at Pullman, Illinois, occupying the position of first messenger, it being among his duties as such messenger to accompany Pullman Cars consigned to parties over the country to their destination, and deliver the same to the proper persons.

This was all the evidence introduced on the trial of the cause tending to show the damages which the jury might properly find by their verdict in favor of the plaintiff, defendant in error, as administratrix of said Matthew W. Ferguson.

There was no evidence introduced to the jury tending to show the expectancy of life of the said Matthew W. Ferguson, or tending to show the amount of his pecuniary income, or tending to show the amount of his necessary expenses in support of himself, or tending to show what he had contributed to the support of his next of kin, unless the evidence hereinbefore set out so tends.

Upon the trial of the cause, counsel for the plaintiff (defendant in error), in argument to the court and jury, claimed that the measure of damages was the value of the life of said Matthew W. Ferguson, and not the pecuniary loss, immediate and prospective, occasioned by his death to his next of kin, and counsel for the defendant (plaintiff in error), claimed in argumnnt to the court and jury that the measure of damages was not the value of the life of said Matthew W. Ferguson, but the pecuniary loss occasioned by his death to his next of kin; that if more than nominal damages were allowed, it must be for the value of the life to the next of kin, and of that value there was no evidence.

The particular portion of the charge of the court to the jury, which relates to the measure of damages, and which is claimed to have been erroneous, is as follows:

"In respect to the damages to be awarded in case of a "verdict for the plaintiff, there is no definite legal rule, "except that the amount can not exceed $10,000. The "action is one given by the statute for the benefit of the "next of kin. Neither the right nor measure of recovery "depends upon proof of the value of the life to the next "of kin; but it is proper for the jury to consider the "character, age, and capacity, and other circumstances "of the deceased; his relations to those for whose benefit "the action is prosecuted, and in its sound discretion "determine the amount of the recovery, not exceeding "the amount stated."

This portion of the charge of the court is set out in the motion for a new trial on page 5 of the printed transcript, also in the bill of exceptions, as part of the charge of the court, on pages 9 and 10 of the printed transcript, and also in the motion for a new trial as exhibited in the bill of exceptions on pages 10 and 11 of the printed transcript.

To this the court added—

"I will add that in the absence of wife and children, "the mother and sisters are the next of kin within the "sense of this statute.

"Nothing should be allowed, however, on account of "the pain or anguish of the deceased suffered in the "article of death, nor for the grief of the mother and "sisters on account of the death or the circumstances of "its occurrence."

POINTS.

I.

The statute on which this action is based is section 284 of the Revised Statutes of Indiana of 1881:

"When the death of one is caused by the wrongful "act or omission of another, the personal representa- "tives of the former may maintain an action therefor "against the latter, if the former might have maintained "an action, had he lived, against the latter for an injury "for the same act or omission. The action must be "commenced within two years. The damages can not "exceed ten thousand dollars, and must inure to the ex- "clusive benefit of the widow and children, if any, or "next of kin, to be distributed in the same manner as "personal property of the deceased."

The court instructed the jury as to the measure of damages. "In respect to the damages to be awarded in "case of a verdict for the plaintiff, there is no definite legal "rule, except that the amount can not exceed ten thou- "sand dollars. The action is one given by the statute "for the benefit of the next of kin. Neither the right "nor measure of recovery depends upon proof of the "value of the life to the next of kin; but it is proper "for the jury to consider the character, age, and capacity, "and other circumstances of the deceased, his relations "to those for whose benefit the action is prosecuted, and "in its sound discretion determine the amount of the "recovery, not exceeding the amount stated."

(Printed transcript, pages 9 and 10).

The court erred in instructing the jury that the measure of recovery did not depend upon proof of the

value of the life of the deceased to the next of kin, and should have instructed the jury that the measure of damages was the pecuniary loss, immediate and prospective, occasioned by the death of the deceased, to his next of kin.

Jeffersonville R. R. Co. *v.* Swayne's admr., 26 Ind., 477;

Board of Commissioners of Howard County *v.* Legg, Admr., 93 Ind., 523;

Ohio & Mississippi R. R. Co. *v.* Tindall, 13 Ind., 366;

Pennsylvania Co. *v.* Lilly, 73 Ind., 252;

2d Thompson on Negligence, 1,289;

Blake *v.* Midland R'y Co., 18 Q. B., 93;

Baltimore & Ohio R. R. Co. *v.* State, 12 Am. and Eng. R. R. Cases, on page 149;

Collins, Admr. *v.* Davidson, 19 Fed. Rep., page 83;

Atchinson, etc. Co. *v.* Brown, Admr., 26 Kansas, 443;

Pennsylvania R. R. Co. *v.* Zebe, 33 Penn. St., 318;

Pennsylvania R. R. Co. *v.* Butler, 57 Penn. St., 335;

Mansfield Coal, etc. Co. *v.* McEnery, 91 Penn. St., 185;

Donaldson *v.* Mississippi, etc. Co., 18 Iowa, 280;

Rose *v.* DesMoines, etc. Co., 39 Iowa, 246;

Barley *v.* Chicago, etc. Co., 4 Biss., 430;

City of Chicago *v.* Major, 18 Ill., 349;

Chicago, etc. Co. *v.* Morris, 26 Ill,, 400;

Chicago, etc. Co. *v.* Shannon, 43 Ill., 338;

Chicago, etc. Co. *v.* Sykes, 96 Ill., 172;

Pennsylvania R. R. Co. *v.* Vanderveer, 36 Penn. St., 298;

Burlington, etc. Co. *v.* Coates, Admx., 15 Am. and Eng. R. R. Cases, 265;
Houghkirk *v.* President, etc. Co., 92 N. Y., 220;
Potter, Admr. *v.* Chicago, etc. Co., 21 Wis., 372;
Regan, Admr. *v.* Chicago, etc. Co., 51 Wis., 599.

II.

The error of the court in its instruction caused the jury to return a verdict for excessive damages.

Rose *v.* DesMoines, etc. Co., 39 Iowa, 246;
Chicago, etc. Co. *v.* Bayfield's Admx., 37 Mich., 205;
Little Rock, etc. Co. *v.* Barker, 33 Ark., 350;
Atchinson, etc., Co. *v.* Brown, 26 Kansas, 443.

ARGUMENT.

May it please the Court:

The plaintiff in error claims that the court erred in its instruction to the jury with reference to the measure of damages. The difference between the positions of the plaintiff and defendant in the court below upon this subject was sharply defined. The bill of exceptions on page 7 of the printed transcript shows that upon the trial of the cause, "counsel for the plaintiff, in argu-"ment to the court and jury, claimed that the measure "of damages was the value of the life of said Matthew "W. Ferguson, and not the pecuniary loss, immediate "and prospective, occasioned by his death, to his next of "kin, and counsel for the defendant claimed, in argu-

"ment to the court and jury, that the measure of dam-"ages was not the value of the life of said Matthew W. "Ferguson, but the pecuniary loss, immediate and pros-"pective, occasioned by his death to his next of kin."

The court adopted the theory of the plaintiff in the court below, the defendant in error here, and as is shown by the bill of exceptions on pages 9 and 10 of the printed transcript, instructed the jury as follows:

"In respect to the damages to be awarded in case of "a verdict for the plaintiff, there is no definite legal "rule, except that the amount can not exceed ten thous-"and dollars. The action is one given by the statute, "for the benefit of the next of kin. Neither the right "nor measure of recovery depends upon proof of the "value of the life to the next of kin; but it is proper "for the jury to consider the character, age, and capacity, "and other circumstances of the deceased, his relations to "those for whose benefit the action is prosecuted, and in "its sound discretion determine the amount of the re-"covery, not exceeding the amount stated."

The court informed the jury that there is "no definite "legal rule," except that the amount can not exceed ten thousand dollars. We admit that there is no *definite* rule, and that the jury in reaching their verdict were not in the position they would have been if they had been seeking to ascertain the value of a firkin of butter, where the evidence showed the weight of the firkin and the market price of the butter; but it did not at all follow from the fact that there is no *definite* rule, that there is no rule at all proper to be given to the jury upon this subject. The court proceeds upon the idea that between one penny and ten thousand dollars there

is no restriction of any kind upon the action of the jury, and that they were in their sound discretion permitted to find any sum they pleased, not exceeding ten thousand dollars.

The court told the jury: "Neither the right nor "measure of recovery depends upon proof of the value "of the life to the next of kin."

Here the court told the jury that the right of the defendant in error to recover, or the amount of damages to be given her by the verdict, did not depend upon proof of the value of the life to the next of kin. The value of the life of the decedent to the next of kin, as shown by the evidence, was not a material or important fact at all, and if there was no evidence upon this subject, or without any regard whatever to what the evidence might be upon this subject, the jury were permitted, without any restraint whatever, except their sound discretion, to determine the amount of the recovery.

The only other suggestion that was made by the court bearing upon the subject was: "But it is proper "for the jury to consider the character, age, and capacity, "and other circumstances of the deceased, his relations to "those for whose benefit this action is prosecuted," etc.

We suppose that perhaps the right to *maintain* the action under the American authorities did not depend "upon proof of the value of the life to the next of kin," and that the defendant in error was entitled to recover nominal damages upon proving that the death of the deceased was caused by the negligence of the plaintiff in error, and that the defendant in error and her daughters were the next of kin. But it is quite clear, we think, that the "measure of recovery" over nominal damages,

did depend "upon proof of the value of the life to the "next of kin."

There is in the instruction not only a conspicuous absence of a suggestion that the correct measure of damages, "was not the value of the life of said "Matthew W. Ferguson, but the pecuniary loss, immedi- "ate and prospective, occasioned by his death to his next "kin," but the instruction given by the court was directly in conflict with this rule.

If there was any doubt at all as to the meaning of the instruction given by the court, which we shall not assume, the jury must necessarily have understood that the court had adopted the theory of counsel for the defendant in error.

We insist that the court should have told the jury that the measure of damages in the case was the pecuniary loss, immediate and prospective, occasioned by the death of Matthew W. Ferguson, to his next of kin.

The right of action in cases of this character is given by section 284 of the Revised Statutes of Indiana of 1881, viz:

"When the death of one is caused by the wrongful "act or omission of another, the personal representatives "of the former may maintain an action therefor against "the latter, if the former might have maintained an action, "had he lived, against the latter for an injury for the "same act or omission. The action must be commenced "within two years. The damages can not exceed ten "thousand dollars, and must inure to the exclusive bene- "fit of the widow and children, if any, or next of kin, "to be distributed in the same manner as personal prop- "erty of the deceased."

This statute has been in force in Indiana ever since May 6th, 1853, and the construction placed upon it by the Supreme Court of Indiana has always been what we insist is the correct rule as to the measure of damages.

The evidence bearing upon the subject of damages showed that at the time of his death, Matthew W. Ferguson was in his twenty-fifth year, and that his home at the time was in Pullman, Illinois; that Pullman was a short distance from Chicago, Illinois, and that before that time he resided at DuQuoin, Illinois, which place is south of the Ohio & Mississippi Railroad. He was unmarried and never had been married. His next of kin were his widowed mother and three sisters, aged respectively twenty-two, nineteen or twenty, and seventeen years. The family moved to DuQuoin from Hamilton county, Ohio, about the 18th day of October, 1878. The deceased left DuQuoin to go into the employment of Pullman's Palace Car Company the 4th or 5th of May, 1882, and went directly into the employment of that company. His place of residence from that time until the time of his injury and death, on the 6th day of June, 1883, was at Pullman, and his family did not see him at all from the time he left home, in May, 1882, until after his death. Before leaving DuQuoin and going to Pullman he had not followed any occupation, except that he had taught school from time to time in the winter. During the spring and winter before he went to Pullman he had taught school at Pamero, Illinois, a village ten miles north of DuQuoin, and during the summer when not teaching school, he was studying law. His father died before the family moved from Ohio. He was a robust young man, of good habits, and good common school education. At the time of his death he occupied the position of first mes-

senger to the Pullman Company, it being among his duties as such messenger to accompany Pullman Cars, consigned to parties over the country, to their destination.

The only evidence there was showing that he had ever in any manner aided his family, was the statement of his mother, "I have been receiving aid from my son."

All the evidence there is upon this subject, is the testimony of Anna W. Ferguson, the mother of the deceased, and of his uncle by marriage, J. J. Higgins, set out on pages 5, 6 and 7 of the printed transcript.

The bill of exceptions on page 7, shows "that this "was all the evidence introduced on the trial of said "cause, tending to show the damages which the jury "might properly find by their verdict in favor of the "plaintiff, as administratrix of said Matthew W. Fergu-"son."

Also: "that upon the trial of said cause, there was "no evidence introduced to the jury tending to show "the expectancy of life of the said Matthew W. Fergu-"son, or tending to show the amount of his pecuni-"ary income, or tending to show the amount of his "necessary expenses in support of himself, or tending to "show what he had contributed to the support of his "next of kin, unless the evidence herebefore set forth "so tends."

The evidence does not disclose what aid he had ever furnished to his next of kin, or when he furnished it, or that he had contributed one penny to their support after he had gone to Pullman. A portion of the time that he was at DuQuoin he lived with his mother, but it does not appear that he even paid her his board. It is not to be

presumed that after he went to Pullman his salary was large enough to pay his personal expenses and then leave a balance for his next of kin, or that there was any balance, and that he gave it to them.

The case of Jeffersonville Railroad Company *v.* Swayne's Admr., 26 Ind., 477, involved the construction of section 784 of the Code of 1852, which is set out on page 484.

This section is exactly the section under which this suit is brought, except that the damages could not exceed five thousand dollars.

On page 484 the court said:

"The right of action created by the statute is founded on a new grievance, namely, causing the death, and *is for the injury sustained thereby*, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit."

On page 486 the court said:

"Our statute creates a new cause of action for the "exclusive benefit of the widow and children, or next of "kin, not for the injury to the deceased, for which, had "he lived, he might have sustained an action, but for "causing his death, and thereby depriving those entitled "thereto of his society and support, and it follows, as a "legal consequence, *that the damages assessed must be* "*based on the injuries resulting from such death* to the "wife and children, or next of kin, for whose benefit the "right of action is given."

The case of Board of Commissioners of Howard County *v.* Legg, Admr., 93 Ind., 523, was an action brought by the administrator of a decedent whose death

was occasioned by a defect in a bridge, for the benefit of his widow and children.

Upon the subject of the damages, the court below instructed the jury as follows:

"Compensation may also be made for the loss of a "parent's care and training to the children in their sup- "port, education and maintenance, and *the loss by the "wife of her husband's companionship.*"

It will be observed that this instruction proceeded upon the theory of *compensating* the widow and children for the loss that had been occasioned them by the death. The Supreme Court reversed the judgment of the court below because the jury had been instructed that it might be made for the "loss by the wife of her husband's companionship."

On page 529 the court said:

"In cases of the class, to which this action belongs, "only pecuniary damages are recoverable." It then proceeds to consider "what damages shall be considered pecuniary," and we respectfully call the attention of the court to what is said upon this subject upon pages 529, 530, 531, 532 and 533 of the opinion as showing the construction that the Supreme Court of Indiana has placed upon this statute.

In this connection we call attention to section 266 of R. S., 1881:

"A father (or in case of his death, or desertion "of his family, or imprisonment, the mother) may main- "tain an action for the injury or death of a child, "and a guardian for the injury or death of his ward.

"But when the action is brought by the guardian for an "injury to his ward the damages shall inure to the "benefit of his ward."

This section has been in force ever since 1852.

Section 266 was section 27, and section 284 was section 784, in the Code of 1852, and the Supreme Court of Indiana in the case of Pittsburgh, Fort Wayne & Chicago Railway Company *v.* Vining's Admr., 27 Ind., 513, held that both sections could stand, and that section 27 authorized an action for the death of a "child."

The court construed the two sections *in pari materia*, and held that the provisions of section 784, as to the time within which the action should be brought, and the limitation upon the amount of the recovery applied to the action authorized by section 27.

The case of Ohio & Mississippi Railroad Company *v.* Tindall, 13 Ind., 366, was an action by Margaretta Tindall, mother of Daniel Tindall, deceased, a minor, against the Ohio & Mississippi Railroad Campany to recover damages for the loss of said Daniel, he having been killed by an engine of said company, running upon its railroad.

In this case the question of the measure of damages arose, and the court below instructed the jury: "That in "estimating the damages, they might take into consider- "ation the actual pecuniary loss to the plaintiff, oc- "casioned by the death of the son and servant, and "*also such other circumstances as have injuriously affected* "*the plaintiff, in person, in peace of mind and happiness.*"

The Supreme Court reversed the judgment, holding the portion of the instruction we have italized to be

erroneous, and the measure of damages to be the pecuniary loss sustained by the plaintiff, occasioned by the death of her son.

In the case of Pennsylvania Company *v.* Lilly, 73 Ind., 252, which was an action by James Lilly against the Pennsylvania Company for negligently causing the death of his infant child, it was held that the plaintiff was only entitled to recover the pecuniary injury he had sustained.

On page 254, the court said:

"It is well settled that, in an action by a parent for "the death of his child, he is entitled to recover only for "*the pecuniary injury he has sustained*, and that the "proper measure of damages is the value of the child's "services from the time of the injury, and until he would "have attained his majority taken in connection with his "prospects in life, less his support and maintenance. "To this may be added, in proper cases, the expenses of "care and attention to the child, made necessary by the "injury, personal expenses and medical services."

These cases indicate the well settled construction of these statutes as understood by the bench and bar of the State of Indiana to be, that the correct measure of damages in this case was as claimed upon the trial by the counsel for the plaintiff in error, "that the measure of "damages was not the value of the life of Matthew W. "Ferguson, but the *pecuniary loss* immediate and pros- "pective occasioned by his death to his next of kin."

Turning to the law upon this subject, in England and Ireland and in the other states of this country, it will be seen that the policy is to give to the next of kin merely a compensation for the pecuniary injury they have sustained.

In 2 Thompson on Negligence, it is said on page 1,289, "It has been almost universally held, that the principle under which damages are to be assessed under these statutes is that of pecuniary injury, and not as a *solatium*."

To support this proposition numerous authorities are cited.

The case of Blake *v.* Midland Railway Company, 18 Q. B., 93 (83 E. C. L., 93) is mentioned as the leading case upon this subject, and of it, it is said, "It has been frequently cited and generally approved."

This action was brought under 9 and 10 Vict. c. 93 (Lord Campbell's Act) and it was held that in an action by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating damages, can not take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only.

And it was also held, that as the trial judge left it in the option of the jury, to give damages on all or any of these grounds, though intimating his opinion that there was no ascertainable damage on any ground but the last, a new trial should be granted for misdirection.

At the conclusion of the opinion of the court it was said:

"From these reasons we are of opinion that the learned judge, at the trial, ought more explicitly to have told the jury that, in assessing the damages, they could not take into consideration the mental sufferings of the plaintiff for the loss of her husband; and that as the damages certainly exceeded any loss sustained by her

admitting of a pecuniary estimate, they must be considered excessive."

In the recent case of Baltimore & Ohio R. R. Co. *v.* State for the use of Hauer, decided by the Supreme Court of Maryland and reported in 12 Am. and Eng. Railroad Cases at page 149, the following statement of the English law is made:

"In the English courts the construction of the statute has been the subject of careful consideration in several cases, and those courts have uniformly held that the damages in such cases must be confined to pecuniary loss, and the jury should not be allowed to take into consideration the pain and suffering of the deceased, or the mental suffering of the parties for whose use the action is brought. But in those cases it is distinctly held that 'legal liability alone is not the test of injury, in respect of which damages may be recovered under the statute; but the reasonable expectation of pecuniary advantage by the relatives remaining alive may be taken into account by the jury, and damages given in respect of that expectation, if it be disappointed and the probable pecuniary loss thereby occasioned.' Dalton *v.* S. E. R'y Co., 4 C. B. (N. S.), 296; Franklin *v.* S. E. R'y Co., 3 H. & N., 211; Pym *v.* G. N. R'y Co., 2 B. & S., 759. In other words, the damages to be allowed for the injury sustained should be a compensation to the family of the deceased, or to those entitled, equivalent to the pecuniary benefit which they might have reasonably expected from the continuance of his life. Bradburn *v.* Great W. R'y Co., L. R. 10, Ex. 1."

See also; Duckworth *v.* Johnson, 4 H. & N. 652, and Burke *v.* Cork, etc. R. Co., 10 Cent. Law Jour., 48.

The case of Collins, Admr. *v.* Davidson, 19 Fed. Rep., 83, was an action under the Minnesota Statute, which is substantially the same as the Indiana Statute, except as to the limit upon the amount of recovery.

Judge McCrary, upon the subject of damages, charged the jury as follows:

"The measure of damages in cases of this character is as follows: If you find for the plaintiff, you will allow him such damages as you deem to be reasonably sufficient to make good to the heirs of the deceased the pecuniary loss to them occasioned by his death, not exceeding the sum of $5,000. In determining this amount, if you come to the question, you may consider any evidence before you tending to show what was the reasonable expectation of pecuniary benefit to said heirs from the continuance of his life. The age of deceased, his pecuniary circumstances, his habits of industry, his accustomed earnings, measure of success in business, and the like, *as far as they appear in evidence*, are proper to be considered."

The Kansas Statute is word for word the same as section 284 of the Indiana Revised Statutes of 1881, and is set out in 2 Thompson on Negligence, page 1,299. In the case of The Atchison, Topeka & Santa Fe Railroad Company *v.* Joseph Brown, Admr., 26 Kansas, 443, the question of damages was considered.

It was said:

"Returning, however, to the mere matter of damages, the jury went to the full limit of the statute, and awarded $10,000. The trial court considered this excessive, and so excessive as to warrant its interference. Can we in review say that such ruling was erroneous?

We think not. Counsel for the administrator have filed an elaborate brief, citing many cases in which large verdicts have been sustained for personal injuries. Their argument is practically this, that if for injuries not taking life, large verdicts may be awarded and sustained; that when life is taken no verdict can be declared excessive which keeps within the limits of the statute. We can not assent to this doctrine. Prior to these various statutes in the several states, it was the accepted law that no action would lie in case of death. To obviate this supposed defect in the common law, these several statutes, taking their origin in Lord Campbell's Act in England, were passed. They all aim to give compensation for the life taken away, and various attempts have been made to prescribe some exact rule for computation of the value of the life taken. Several courts have laid down arbitrary rules, but in the case of the K. P. Ry. Co. *v.* Cutter, 19 Kas., 83, following the case of R. R. Co. *v.* Barron, 5 Wall., 90, we held that no arbitrary rule can justly be laid down; that the elements which enter into the just estimate of a life are so varied that the matter must be left, under the direction of the court, to the sound discretion of the jury. The purpose of the statute is compensation, and that up to a certain point the value of the life taken should be paid by the wrongdoer to the parties interested in the life. The statute has put the limit at $10,000. We do not understand that that puts a maximum as the value of the most valuable life, with all other lives to be graduated downward therefrom; and yet we do not agree with counsel that because no man would give his life for $10,000, and that as life and money are not commensurate or convertible terms, no court can say, when a jury awards $10,000 for any life, that it is excessive. It is not the loss of the decedent, but the loss of the survivors, which

is to be estimated. That involves not merely the probable accumulations of the deceased, but the probability of the benefit of such accumulations enuring to the survivors. Where one who was the head of a family, with minor children, is killed, there is a reasonable certainty that his earnings, if he had survived, would enure directly to the benefit of the widow and children. Where one dies without wife or child, with no one legally dependent upon him, and with only remote relatives as his next of kin, there is only a remote probability that his earnings, whatever they may be, would enure to such next of kin. The law of human experience is, that when a man has no one legally dependent upon him, his earnings, be they great or small, are appropriated to his own benefit or pleasure, so that his life, whatever may be his capacity for earning, has but little, if any, value to remote relations. Again, when the nearest of kin are not remote relatives, and yet are not in any way legally dependent, the benefit of such life to such next of kin will depend largely upon their needs as well as upon his earnings. Where the deceased, leaving no wife nor child, leaves as his next of kin father or mother, and such father or mother is in good pecuniary condition, it is fair to say that his life would, if he survived, have been of comparatively little value to them. In other words, his earnings would be used for his own pleasure or profit, and not go to the increase of their present good financial condition. The law of human experience and probabilities controls as to these matters. If according to that law the life of the decedent, if continued in existence, would bring little gain to the next of kin, little compensation should be given for his loss. We can not agree that the theory of the law is to punish for the mere negligent destruction of life; and the law of compensation means that no more

should be given to the next of kin than they probably would receive from the decedent if his life had not been taken away. And, as before indicated, many matters must be considered in determining how much that life would probably be worth to such next of kin if it had not been taken away. In the case before us the decedent left neither wife nor child; his mother was next of kin, and in determining what would be the probable value of that life to her, regard must be had to what he had done in the past toward her support and maintenance, and what, considering her means and his earnings, as well as his habits and disposition, he would be likely to do in the future. It is not fair to say that all his surplus earnings would go to her, because it is not the law of human experience. If she had means enough for her own support, the probabilities are that none of his earnings would go to her; that in one way or another he would consume them entirely. The statute does not contemplate a speculation on the probable earnings of the deceased; it simply aims to make good to the survivors that which they have probably lost by his death. Of course there is no absolute certainty in matters of this kind. The life taken away to-day by negligence of the defendant, may have been one which, by the laws of nature, would have passed away to-morrow if no outside accident had intervened; or perchance if it had escaped the negligence of the defendant to-day, it would have fallen a victim to the negligence of some other party to-morrow; so that the real value of the life is problematical and speculative to a certain extent."

In the case of Houghkirk *v.* President, etc. of the Delaware & Hudson Canal Co., 92 New York, 219, an action under the New York statute, the court said upon the subject of damages, on page 224:

"Recognizing the generally prospective and indefinite character of these damages, and the impossibility of a basis for accurate estimate, it allows a jury to give what they shall deem a just compensation, and limits their judgment to a sum not exceeding $5,000. (Tilley *v.* Hudson Riv. R. R. Co., 29 N. Y., 252). But within that range the jury is neither omnipotent, nor left wholly to conjecture. They are required to judge, and not merely to guess, and therefore, such basis for their judgment as the facts naturally capable of proof can give should always be present, and is rarely, if ever absent."

The defendant in the court below relied on the case of Pennsylvania, etc. Co. *v.* McClosky, 23 Penn. St., 526.

The action was by an administrator to recover damages from a railroad company for the loss of the life of David McClosky by the negligence of the agents and servants of the company.

The court on page 530 said:

"Our act of 15th April, 1851, seems to express its purpose better than the English one heretofore referred to; for in one section it simply provides that the action commenced for injuries to the person shall not abate by the plaintiff's death, but shall survive by substitution of his personal representatives; and in another, that if no suit for damages be brought during life by the party mortally injured, by negligence or violence, then the widow, and if there be no widow, the personal representatives, may maintain an action for damages for the death.

"The first of these sections is very plain, and it provides that the personal representatives may continue the action commenced, that is, may proceed and recover the very damages to which the deceased would have been entitled, had he survived until the verdict and judgment.

"The other section is somewhat less definite in regard to the damages intended; but this very indefiniteness is proof that no other thought was in the mind of the legislature than the wrong and damage done to the decedent; else it would have been made to appear. If one section related to damages done to the deceased, and the other to damages done to his relatives, these contrasted thoughts could hardly have failed to come out clearly in the expression.

"But even if this were otherwise, we do not perceive how it could influence the damages; for they must necessarily be measured by the absolute value of the life lost, and not by the pecuniary loss which the designated representatives shall have thereby sustained."

The Pennsylvania Railroad Company *v.* Zebe, 33 Penn. St., 318, was an action by Nicholas Zebe and Elizabeth, his wife, against the railroad company to recover compensation for the death of their son, Peter Zebe, who was killed on the defendant's railroad.

The court, upon the subject of damages, instructed the jury, "If the jury find for the plaintiff, the question of damages is one for the jury entirely."

(See page 321).

Commencing on page 327, the court said:

"The eleventh assignment of error regards the question of damages. The court instructed the jury on this subject by saying, 'If the jury find for the plaintiff, the question is one for the jury entirely.' There was no prayer for instructions. Yet this will not prevent a party dissatisfied with the charge, from having it reviewed, and errors corrected, if they exist, in the charge as given. It is obvious that this general and unrestricted reference of the question of damages to the jury, gave them the

fullest latitude of construction in assessing them. If left them to base that assessment upon such standard as each juror might set up for himself, or any common one that might happen to suit the feelings, taste, or judgment of all, in the particular case, never again, perhaps, to be the rule in any future case, however similar in circumstances. Rights should be better defined. And, although, from the inherent difficulty in estimating the value of life, when called upon to compensate for its loss, we can not lay down what may properly be called rules, to guide in making the estimate, yet it is our duty to announce such principles of compensation as we think the legislature intended by the act in question, that there may be some approximation to uniformity of results in such cases.

"The Act of the 15th of April, 1851, provides 'that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.' The Act of the 26th of April, 1855, changed the law, so far as the personal representatives were concerned, and conferred the right of recovery only upon parents for the loss of children, and upon children for the loss of parents, and reciprocally upon husband and wife. These acts confer new rights unknown to the common law. It existed in the civil law, and was an institution of the old Saxon Code; so too, is it to be found in the Scottish law, under the head of 'Assythements for Homicide.' But as the compensation under all these laws rested upon very precise regulations, generally, peculiarly applicable to the times, circumstances, estates, and condi-

tions of the deceased and the parties entitled, we derive no light from them.

"In 1846, the statute of 9 and 10 Vict. Cap. 93, was passed in England, providing for the recovery of damages, 'whensoever the death of a person shall be caused by wrongful act, neglect, or default,' against the party occasioning the same. The damages, it has been held, are for the *death* of the party, as it is with us. Under this statute, providing for compensation for the same thing as does ours, namely, the death of the decedent, we have one case which turns on the subject of the rule of damages. It is the case of Blake *v.* Midland Railway Company, 10 Eng., L and Eq., R. 437. The case had been tried before Baron PARKE, at Derbyshire Assizes, and came before the Queen's Bench in banc, on a rule to show cause why a new trial should not be granted, on the ground of misdirection in regard to the principle upon which damages should have been assessed. In granting the new trial, the doctrine is held that the jury, in estimating damages under that statute, 'are to be confined to injuries, of which a pecuniary estimate can be made, and can not take into consideration the mental suffering occasioned to the survivors by the death,' and that nothing may be allowed as *solatium*, that being incapable of a pecuniary estimate, nor for the sufferings of the injured party.

"The difficulty of estimating the value of the life and the consequent damage to the survivors in the loss of it, is conceded in the case, but the reasoning of the learned judge is forcible in illustrating the greater difficulty which would have to be encountered in estimating damages for what can not be measured by any pecuniary standard, such as grief, loss of society, and the thousand nameless things which make up the estimate in which

the deceased may have been held by the survivors entitled to damage under the law. And hence the conclusion, that the provision giving damages for the death, was only such as could be tested by a pecuniary estimate, not speculative or fanciful. 'The measure of damage,' said the learned judge, 'is not the loss or suffering of the deceased, but the injury resulting from his death to his family.' Our statute, although differing, in the absence of details, from the British statute, is a provision for compensating precisely the same sort of injury, the damage occasioned to the survivor by the death of the decedent, and hence we may avail ourselves of the light shed upon the subject by the learned court in the case cited.

"In England, under this construction of their statute, damages seldom exceed one or two hundred pounds sterling. One great merit in the rule, and what undoubtedly was the legislative intent there, as with us, is that it is a rule of equality, compensating the rich and poor, the refined and cultivated, and those less so, by the simple standard of pecuniary loss.

"The case of the Pennsylvania Railroad Company *v.* McCloskey's Administrator, 11 Harris, 526, while it adheres to the rule of giving damages only upon such bases as are susceptible of pecuniary estimate, seems to regard the value of the life lost as the basis of the estimate, rather than the injury resulting from it to the survivor entitled to sue. This conclusion flowed from the form of, and parties to, the action, and naturally led to the result. It was a suit by the personal representatives, for the benefit of the estate. Treated in this light, and as the plaintiffs, the administrators, were not damaged by the death, but were recovering for the estate, the only estimate, it seems to me, that could be made, was of the

value of the life. The wrong done to it survived by virtue of the statute to the estate, and gave the personal representatives their right of recovery co-extensively with its value. But for some reason—a wise one, of course—this law was in 1855 altered, and the right to sue was conferred on parents for the loss of children, and children for parents, and reciprocally between husband and wife. This was a new and independent right, given by positive law, not cast upon them by survivorship as for an injury to the decedent. It is for the wrong done to them. In this view of the law, we think the rule which should have been observed in this case differs from that in the Pennsylvania Railroad Company *v.* McCloskey's Administrator, and more resembles the case of a father suing for injury to his child. In the case of the Pennsylvania Railroad Company *v.* Kelly, 7 Casey, 372, the rule of damages in such a case was considered, and in delivering the opinion of the court, Mr. Justice WOODWARD says, 'the damages must be compensatory, merely, and that compensation must have regard to the plaintiff's loss of his services, and to the expense of nursing and medical treatment.' 'The father was entitled to the services of his child during minority, and by just so much as this injury impaired the value of this right was he entitled to compensatory damages,' and it was added, 'that it was proper for the jury to understand that the suffering endured by the boy, and the disfiguration of his form, and whatever was merely personal to him, should not enter into the father's damages, because for them the 'son would have a right of action.' This is a rule of damage on a very kindred subject, and is scarcely distinguishable from cases like the present, except in extent of injury, and is, in essence, the principle of the cases already cited.

"From the authorities and reasons given, the jury, instead of the unrestrained license given them in the charge, in the assessment of the damages, should have been instructed that, if the plaintiffs were entitled to recover, it was for the damage done in producing the death of the son, and that this was to be estimated by the pecuniary value to them of his services during his minority, together with expenses of care and attention to the deceased, arising out of the injury, funeral expenses and medical services, if any. This is the only pecuniary damage done to them, and this the law allows them to recover, if entitled on the facts to recover at all. This excludes damages for the suffering of the deceased, which was personal to himself, and did not survive, as well as for solace, which are incapable of appreciation, so as to be compensated. No money could be the measure of the affliction. No road, great or small, but would fall beneath the weight of such a rule, if applied; and for an injury happening by a mere oversight, amounting, of course, to negligence, by some agent in the transit of the cars, it would be a severe penalty to visit the company with extravagant and exterminating damages. But they should be held to a strict accountability to the extent that a fair interpretation of the statute will allow. In making the estimate of the value of the life and consequent damage by the death, much is still left to the sound discretion of the jury. Whatever is susceptible of a pecuniary estimate is included within it, and what we have seen was not to be included, must be excluded."

The Pennsylvania Railroad Company *v.* Butler 57 Penn. St., 335, was an action by Mary A. Butler and Samuel H. McCoy, guardians of four minor children of William Butler, deceased, against the railroad company for negligence in causing the death of the deceased.

The court upon the subject of the measure of damages, said on page 337:

"The second error assigned is, that the learned judge erred in his instructions to the jury as to the measure of damages. These instructions were as follows:

'It would perhaps be a fair way to estimate the amount of damages, to take the probable amount of his (deceased's) accumulations for the time he might reasonably have been expected to live, and find that for the plaintiff. This, as we said, may be a fair way of calculating the damages sustained; but as it has been said in Pennsylvania Railroad Co. *v.* McCloskey, 11 Harris 526, if you can find a better rule you are at liberty to adopt it. In estimating his accumulations, you will remember that it might not be fair to deduct his family expenses, because his family lived out of it, and now they do not have it to live upon.' We think there was manifest error in this instruction. It gave the jury no definite measure of damages whatever, but left them at liberty to adopt any one they saw fit. The case of Pennsylvania Railroad Co. *v.* McCloskey, 11 Harris 526, to which the learned judge referred, was an action by the personal representative of the deceased under the act of April 15th, 1851, and has no applicability to an action instituted as this was under the Act of April 26th, 1855, as is shown by the present Chief Justice in his opinion in The Pennsylvania Railroad Co. *v.* Zebe, 9 Casey 318. There is no doubt an inherent difficulty in placing a pecuniary value upon human life, especially the value of a father's life to his children. Yet it is certainly important that a clear and definite rule should be established, and as this case goes back, it seems to be our duty to say what the instruction of the court below to the jury ought to have been. After an attentive examination and review of all

the cases which have heretofore been decided, we are of opinion that the proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered—in this instance the children of the decedent—without any *solatium* for distress of mind; and that loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure."

In the case of Mansfield Coal & Coke Co. *v.* McEnery, 91 Penn. St., 185, the action was brought by Mary McEnery and children, the widow and children of John McEnery, deceased, against the Mansfield Coal & Coke Company, to recover damages for the death of said John McEnery, which it was alleged was caused by the negligence of the defendant.

The court approved the rule as to the measure of damages laid down in Pennsylvania Railroad Company *v.* Butler, 57 Penn. St., 325.

The court then proceeded on page 189:

"In his answer to the plaintiffs' fifth point, the learned judge went beyond any of the cases cited. In the point referred to, the court was asked to instruct the jury that 'the damages which may be allowed in this action may be summed up as the pecuniary value of the life of John McEnery to his family, including wages and all such service, as a father could render, of pecuniary value to the wife and children, whilst the jury are at liberty to take into consideration questions of health, liability to accident or death. *They may also consider the opportunities of acquiring wealth or fortune by change*

of circumstances in life.' This point the learned judge affirmed without qualification. No fault is found with the first sentence of the point, but the affirmance of that portion I have *italicised* gave the jury a license that was practically without limit.

"It was substituting for the ordinary, reasonable and probable incidents of life, that which was speculative and unusual. What are 'the opportunities of acquiring wealth or fortune by change of circumstances in life,' and how can a jury measure them? A laborer toiling in the mines may by chance pick up a nugget of gold with a fortune. Industry, thrift and sagacity have enabled some poor men to become millionaires. These cases, however, are exceptional. They are only the possibilities of life. Looking at mere possibilities, this unfortunate mule driver, had he lived, might have become President of the United States. Yet, to estimate the damages to his family by his death upon the basis of a President's salary would be worse than a burlesque upon the administration of the law. Such a principle, carried to its logical conclusion, might bankrupt any person, firm or corporation engaged in a business which involved the use of an element of danger. The point in question was probably framed by way of set-off to the defendant's eighth point, in which the court was requested to instruct the jury, that in arriving at the value of the deceased's life, they should consider 'the uncertainty of life, the uncertainty of health, the uncertainty of constant employment, and should also consider how much it would have cost to board and clothe the decedent.' This point was properly affirmed. The incidents to which it refers are such as are usual in the course of a man's life. Nothing is more certain than that life, health and constant employment are uncertain. It is reasona-

ble, therefore, that these elements should be considered by a jury in estimating the value of a man's life to his family. There is a degree of uncertainty about them, it is true, which makes it difficult for any jury to arrive at a strictly accurate conclusion. This renders it the more necessary that to those admitted elements of uncertainty, there shall not be added others which are purely speculative. There was error in affirming the italicised portion of the plaintiffs' fifth point."

It is quite evident that the decision in the case of Pennsylvania, etc., Co. *v.* McClosky, 23 Penn. St., 526, was based upon the idea that the statute gave to the administrator the right of action possessed by the decedent, and that the damages recovered became part of the decedent's estate in the hands of his administrator.

It is not necessary for us to consider whether this was or was not a correct construction of the statute. It is sufficient to show that it does not support the theory of the defendant in error, and the instruction of the court below, and that the Pennsylvania cases decided subsequently are directly in conflict with the theory of the defendant in error and the instruction of the court.

Section 4,111 of the Iowa Revision of 1860 is as follows:

"SECTION 4,111. When a wrongful act produces death, the perpetrator is civilly liable for the injury. The parties to the action shall be the same as though brought for a claim founded on contract against the wrong-doer and *in favor of the estate* of the deceased, and the sum recovered shall be disposed of in the same manner, except that when the deceased left a wife, child or parent surviving him, it shall not be liable for the payment of debts."

This act is very similar to the Pennsylvania act of April 15, 1851, under which the case of Pennsylvania Railroad Company *v.* McClosky, 23 Penn. St., 526, was decided.

We call the attention of the court to two cases decided under the Iowa statute, and they show that the measure of damages was held to be not the value of the life, but the pecuniary injury sustained by the estate in the death of the decedent.

Donaldson *v.* The Mississippi & Missouri Railroad Company, 18 Iowa, 280;

Rose *v.* The DesMoines Valley Railroad Company, 39 Iowa, 246.

The defendant in error also relied upon the case of Railroad Company *v.* Barron, 5 Wall., 90, involving the construction of the Illinois statute.

In that case the court below instructed the jury that it was not necessary that the next of kin should have a *legal* claim upon the deceased for support and services. The plaintiff in error does not claim that this is not sound law.

The court also charged that the next of kin need not prove *present* pecuniary loss.

The plaintiff in error does not controvert this proposition.

The deceased was, at the time of his death, thirty-five years of age, and had accumulated property to the amount of thirty thousand dollars, and the court told the jury that the next of kin were interested in his future accumulations.

That the jury had a right in estimating the amount of the "pecuniary injury," to take into consideration the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase in wealth of a man of his age, with the business and means which he had. That there was a possibility in the chances of business, that decedent's estate might have decreased rather than increased, that this possibility the jury might consider. Also that the jury had the right to take into consideration the contingency that the deceased might have married and his property descended in another channel.

In conclusion, the court told the jury:

"The intention of the statute was to give a *compensation* for the *pecuniary loss* which the widow (if any) or the next of kin might sustain by the death of the party; and the jury are to determine, as men of experience and observation, *from the proof*, what that loss is."

This court said:

"The second question is as to the proper measure of damages.

"The only direction on this subject in the statute is, that the jury may give such damages as they shall deem a fair and just compensation, regard being had to the pecuniary injuries resulting from the death to the wife or next of kin, not to exceed five thousand dollars."

Also:

"If the deceased had lived, they may not have been benefited, and if not, then no pecuniary injury could have resulted to them from his death."

In the case cited the court below instructed the jury fully as to the rules regulating the consideration of the evidence

and the principles to guide them in arriving at the measure of damages, and there is nothing sustaining the theory of the defendant in error, "that the measure of damages was the value of the life of Matthew W. Ferguson, and not the pecuniary loss, immediate and prospective, occasioned by his death to the next of kin."

The same is true of the Pennsylvania cases.

For additional authorities construing the Illinois statute, we refer to Barley *v.* Chicago & Alton Railroad Co., 4 Biss., 430; City of Chicago *v.* Major, 18 Ill., 349; Chicago, etc., Co. *v.* Morris, 26 Ill., 400; Chicago, etc. Co. *v.* Shannon, 43 Ill., 338.

In the case of the Chicago, Burlington & Quincy Railroad Co. *v.* Sykes, 96 Ill., 162, the court below instructed the jury: "Then the jury may, if such facts are proven, find the defendant guilty, and assess plaintiff's damages at some amount, not exceeding the sum of $5,000, claimed in the plaintiff's declaration."

With reference to this instruction, the court said on page 173:

"The instruction is inaccurate in telling the jury that, if they found defendant guilty, they might assess plaintiff's damages at some amount, not exceeding $5,000, the amount claimed in the declaration. *This part of the instruction leaves the jury at liberty to find any amount, not exceeding the amount claimed, without the slightest reference to any proof of the amount of damages sustained. It amounted to an uncontrolled license to find any sum under the limit that they might choose*, and, as they have found to the full limit, it may be, and probably they did, exercise the liberty the instruction gave them, without reference to the evidence on that question. *In this class of cases, instructions should be accurate and precise in*

reference to the finding of damages. This may have misled, and probably did mislead the jury, in assessing damages."

In the case of Rose *v.* The DesMoines Valley Railroad Co., 39 Iowa, 246, it was said in a case of this character, on page 256:

"And while, as before remarked, no exact rule can be laid down by which the precise sum of money lost to the estate of the deceased may be computed, yet an approximate amount can be ascertained from the probabilities created by all the surrounding circumstances, and hence the law will not leave the amount to the uncontrolled discretion of the jury. While much is left to their sound discretion, yet they are not authorized to found their verdict upon mere speculation. The Pennsylvania Railroad Company *v.* Vandever, 36 Penn. St., 298. When, therefore, it is manifest that the jury have gone grossly beyond the rule of compensation, their verdict ought not to be allowed to stand, and it becomes the imperative duty of the court to arrest the excess. Collins *v.* City of Council Bluffs, 35 Iowa, 432."

In the case of The Pennsylvania Railroad Company *v.* Vandever, 36 Penn. St., 298, cited with approval by the Iowa court, the court below instructed the jury: "The question of damages is also for you. Should you feel it necessary to examine that question, let fair and exact justice be your guide, and your own good sense will determine it."

The Supreme Court said:

"This was clearly wrong, and is covered by the decision of this court in The Pennsylvania Railroad Company *v.* Zebe, 9 Casey, 318."

In the case of The Burlington, Cedar Rapids & Northern R. R. Co. *v.* Coates, Admrx., 15 Am. and Eng. R. R. Cases, 265, which was an action by the administratrix and widow, to recover damages for injuries resulting in the death of her husband, under the Iowa statute, the court below instructed the jury as follows:

"If you find for the plaintiff, the measures of damages will be such a sum, not to exceed the amount claimed, as you find from the testimony in the case will compensate for the loss sustained by the injuries, taking into consideration all the testimony before you having a bearing thereon."

Of this instruction the court said:

"This instruction should have been more explicit in defining the measure of damages to which the plaintiff was entitled, if any. For the elements of damages properly entering into cases of this character, see Donaldson *v.* Railroad Co., 18 Iowa, 280."

We have said that perhaps the action might have been maintained for nominal damages upon the defendant in error proving that the death of the deceased was caused by the negligence of the plaintiff in error, and that the defendant in error and her daughters were the next of kin, but upon this subject the American authorities are in conflict, and a number of exceedingly respectable courts have held the contrary.

The Supreme Court of Wisconsin maintains this rule, and we mention it as one of the class referred to.

In the case of Potter, Admr. *v.* The Chicago, etc., R'y Co., 21 Wis., 372, the court said on page 379:

"The principal question in this action relates to the rule of damages. The action is brought under sections 11

and 12, ch. 135, R. S. The provisions of the statute, so far as any questions arise in this case, are in substance the same as Lord Campbell's Act, 9 and 10 Vic., ch. 93. The plaintiff was entitled to recover such damages, not exceeding five thousand dollars, as the jury might deem fair and just in reference to the pecuniary injury resulting from the death of the daughter, Frances L. Bishop, to her parents. The statute does not say, in terms, on what principle the damages are to be assessed.

"But all the authorities are to the effect, that vindictive damages are not to be given; nor are they to be given for loss of society, or as a *solatium*, or for injury to feelings; but they must be founded on pecuniary loss, actual or expected, and should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life.

"It was for the jury to determine what was the extent, *under the proof in this case*, of such reasonable expectation. *The verdict must, however, be based upon evidence.* The statute is peculiar, and much must be left to the sound judgment and discretion of the jury. *But we do not think it was intended they should find a verdict for damages without evidence of pecuniary loss.*"

In the case of Regan, Admr. *v.* Chicago, etc., Ry. Co., 51 Wis., 599, the court held that a complaint by an administrator, who was also a child of the intestate, for injuries to his intestate, causing his death, which alleged that, by means of such wrong, the plaintiff had sustained damages in a certain sum, but stated no facts to show the pecuniary loss, present or prospective, resulting from the death, to the widow or relatives of the deceased, did not state a cause of action under the statute.

The damages found by the jury under the instruc-

tion given, were excessive. The jury, under the instruction given by the court, returned a verdict for *seven thousand dollars.* This gave the next of kin a capital of seven thousand dollars, which secured for them an income, forever, of two hundred and ten dollars per annum, at the rate of three per cent.; of three hundred and fifty dollars per annum, at five per cent.; and of four hundred and twenty dollars per annum, at six per cent. The lawful rate of interest in Indiana, by contract, is eight per cent.

If the measure of damages is as we claim it to be, it is impossible to suppose that this was a reasonable estimate of the pecuniary loss, immediate and prospective, occasioned by the death of Matthew W. Ferguson, to his next of kin. There was nothing in the evidence that would justify a verdict of this character. No thoughtful juror, properly instructed, would suppose that Matthew W. Ferguson would contribute during the rest of his life, year by year, either amount to his next of kin, or that in the chances and accidents of life, and the probabilities as to the future, Matthew W. Ferguson would die without wife and children, and accumulate and leave to his next of kin seven thousand dollars.

In the case of Rose *v.* The DesMoines Valley Railroad Company, 39 Iowa, 246, which was an action under the Iowa statute to recover the damages occasioned by the death of a young man, twenty-four years of age, and the expectancy of whose life was proven to be 38, 39–100 years, it was shown that he was of temperate and industrious habits, and that his *net* earnings were $263.11 annually.

The verdict of the jury was for ten thousand dollars and there was judgment upon the verdict.

The Supreme Court said on page 257:

"It being clear to us that the damages awarded by the jury are so excessive as to make it apparent that they were given 'under the influence of passion or prejudice,' the judgment must be reversed, unless the plaintiff will remit the excess over five thousand dollars."

It will be borne in mind that the action in this case was for damages "for the pecuniary loss to the estate" of the deceased, and not as in the case at bar, for the damages occasioned to the next of kin by the death. Also, that in the case at bar, the evidence did not show that the wages of the deceased were any more than were necessary to meet his actual expenses.

The court said on page 255:

"In cases like this, the true question always is, what sum of money will compensate the estate of the deceased for the loss sustained thereto by his death? The expectancy of life being a little over thirty-eight years, and his net income being $263.11 per year, if he had lived for this time, and continued to earn the same income during the whole time, his estate, it is supposed, would have received the benefit of these earnings and their accumulations.

"One-half of the sum awarded, viz: five thousand dollars, at six per cent. interest, would produce annually a net income greater than that earned by the deceased, and at ten percentum would produce annually nearly double the sum that he would annually earn during the expectancy of life, which, added to the principal sum, would bring to the estate at the end of that time, a sum almost double that of the earnings of the deceased had he lived. No one would think of loaning money in Iowa at less than ten per centum per annum, for it readily brings that rate of interest by the year, and is lawful.

"In estimating the damages the jury should consider the

exact situation, annual earnings, health, habits, etc., of the deceased: Chi., R. I. & P. R. R. Co. *v.* Morris, *et al.*, Adm'rs., *etc.*, 26 Ill., 400; and give full compensation for the pecuniary loss, resulting to his estate from the killing. It is true that the precise loss may not be capable of exact computation, for although the deceased may have been in good health, of good habits, and enjoying a net income as the fruits of industry and frugality, these things might not have continued during the whole, or any considerable portion of the expected term of his life. On the other hand, a continuance of health, good habits, industry, and frugality, together with fortuitous circumstances, might have enabled him to largely increase his income from year to year, throughout the entire term of the expected life, accumulating great wealth, and at his death leave a very large estate.

"These, however, are mere speculations, and are not to be made the basis upon which to compute the damages in cases of this kind."

The court also said on page 256:

"As we have already said, full compensation should be made, not for the life destroyed, *for no sum of money, however great, would be sufficient for that purpose*, and it is not upon this basis that the damages are estimated, but compensation for the pecuniary loss to the estate is the remedy the law gives. The sum we have named will, as we have seen, produce annually nearly double the net earnings of the deceased, and seems to us to be a very liberal compensation, under the evidence and circumstances of the case. We do not say that this sum is the exact sum which will make the estate of the deceased good for the loss sustained thereto in his death. On the other hand, we believe this sum to be even more than enough to compensate for the injury; that since the amount can be

reached only approximately, upon the probabilities of the case, drawn from all the evidence and circumstances, we name this sum as the largest that can be awarded under the well settled rules of law applicable to the case."

The italics are those of the court.

The Chicago & Northwestern Railway Co. *v.* Bayfield, Admrx., 37 Mich., 205, was an action to recover damages under the Michigan statute for the negligent killing by the railway company of plaintiff's intestate and next of kin, and the verdict was for $3,400.

On page 216, the court said:

"As the verdict awarded to the plaintiff, $3,400, it would seem very manifest that the instruction misled the jury into giving damages for something besides the pecuniary injury. As the plaintiffs' showing was, that Williams was feeble in body and mind, and earned the wages of a common laborer only, from which his own support must be derived, it is difficult to understand any estimate which would place the loss of the family at such a sum. The annual interest on it, at the customary legal rate for money borrowed, would have been more than three-fourths the whole annual earnings, even supposing Williams to have had steady employment, and to have lost nothing from sickness or other contingencies; and at the lowest statute rate, it would have been more than half. It seems incredible that the family could have had reasonable expectation of receiving an annual sum to either amount, from such a source; but if they had, they could at most have realized it only for his lifetime, while this award of the sum in gross would enable the family to realize the income, not for his life merely, but in perpetuity."